No. 4655

United States Circuit Court of Appeals

For the Ninth Circuit

K. MATUSAKE,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON

NINTH DIVISION

SUPPLEMENTARY BRIEF FOR PLAINTIFF IN ERROR

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This supplementary brief is served and filed because of the fact that the opening brief, on behalf of the Plaintiff in Error, was prepared and filed by the original counsel in the case and before the present counsel had become actively connected therewith.

STATEMENT OF THE CASE.

The Plaintiff in Error was charged with the violation of the National Prohibition Act, by an information containing two counts.

In count 1, it was charged that on the 12th day of March, 1924, in the City of Seattle, the Plaintiff in Error was unlawfully in possession of certain intoxicating liquor therein described, with the intent to sell and dispose of the same.

In count 2, it was alleged that the Plaintiff in Error maintained a common nuisance in the City of Seattle, by the manufacturing, keeping and selling of intoxicating liquors (Trans. pp. 2 and 3).

To this information the Plaintiff in Error, when arraigned, entered a plea of "not guilty" (Trans. p. 4). Thereafter, and prior to the trial of the cause in the court below, the Plaintiff in Error moved to quash the search-warrant under which certain evidence had been seized and to suppress this evidence (Trans. pp. 22-23, 25-26).

This motion was based on the insufficiency of the affidavit for the search-warrant in that it failed to contain any statement of evidenciary facts, showing probable cause for the issuance of a search-warrant (Trans. pp. 28 and 29).

The motion to quash and the motion to suppress were supported by the affidavit of the Plaintiff in Error, and the affidavits of K. Shitama and Kiyoshi Muracka (Trans. pp. 33-37).

On the hearing the court denied these motions on the ground that the Plaintiff in Error, in his supporting affidavit, denied ownership, possession and control of the premises searched, and the property seized (Trans. p. 37). Thereafter, on the 18th day of December, 1924, the cause came on regularly for trial before the Honorable Edward E. Cushman, and a jury. Testimony was introduced on behalf of the Defendant in Error, to the effect that the defendant, at the time stated in the information, conducted an hotel in the City of Seattle, at 604½ 6th Avenue South, and that on that date several prohibition agents, fortified with a search-warrant, entered the basement under said hotel, known as 606 Sixth Avenue South, and there found a quantity of intoxicating liquor. There was no stair-way or entrance from the hotel into the basement. While the agents were searching the basement the Plaintiff in Error entered and exhibited to them a lease from him to a third person for the basement rooms, and in conversation at first admitted, but afterwards denied, that the basement storerooms and the contents belonged to him.

A quantity of the liquor seized and the containers were offered in evidence by the Defendant in Error. To this offer the Plaintiff in Error objected on the ground that it had been seized under AN INVALID search warrant. This objection was overruled and an exception allowed and entered, and thereupon the evidence in question was admitted and marked as an exhibit in the case (Trans. pp. 39 to 42).

The Plaintiff in Error, in his own behalf testified, that at the time mentioned in the information he owned and operated the Pacific Hotel, situated at 604½ Sixth Avenue South in the City of Seattle, and leased the rooms in the basement, to which there was no access from the hotel, to third persons for storage and manufacturing purposes and had no interest in nor control over them (Trans. pp. 45, 46). In this he was corroborated by other witnesses (Trans. pp. 43-47-48). At the close of the case and after having been instructed on matters of law by the trial judge, the jury returned a verdict finding the defendant "guilty" on each count of the indictment (Tr. p. 7), and thereafter on the 6th day of January, 1925, the court sentenced the Plaintiff in Error to pay a fine of three hundred ($300.00) dollars on count one, and to serve three

months in the county jail of Whatcom County, Washington, on count two.

From that judgment and sentence this appeal is prosecuted.

ASSIGNMENT OF ERRORS.

1. That during the trial of the cause in the court below, the trial court erred in admitting in evidence certain bottles, jars and demijohns of intoxicating liquor over the objection of the Plaintiff in Error, for the reason that this evidence, and all the evidence referred to by the prohibition agents, was seized under an illegal and void search warrant; the illegality consisting in the fact that the affidavit for the search warrant contained no statement of evidentiary facts, showing probable cause for the issuance of the search warrant.

ARGUMENT.

Prior to the trial on the merits a motion to quash the search warrant and a motion to suppress the evidence seized thereunder were interposed, and after a hearing, denied by the court on the sole ground that the Plaintiff in Error, in his supporting affidavit, denied ownership, possession and control of the premises searched, and the property seized. With the correctness of this holding it is

not now necessary to take issue for the reason that on the trial the Defendant in Error, in making its case in chief, introduced some (Tr. pp. 9-10) testimony to the effect that the Plaintiff in Error, at the time of his arrest, admitted ownership, possession and control of the premises searched, and thereupon the evidence seized under the search warrant was offered as an exhibit in the case.

The offer of this evidence was objected to by the Plaintiff in Error on the ground that it had b een seized in the first instance under an unlawful and void search warrant. The fact that a motion to suppress had been introduced prior to the trial and denied did not preclude the defendant from raising the question of the invalidity of the search warrant during the course of the trial when the evidence seized was offered in evidence against him.

This course has been approved by the Supreme Court of the United States and followed by the lower Federal Courts in numerous instances.

In the case of *Gouled vs. United States,* 255 U. S. 298, the validity of the search warrant was attacked by a motion to suppress prior to the trial, and the motion denied. Thereafter, on the trial when the evidence seized under the search warrant was offered, objection was made and overruled. On

appeal to the Supreme Court it was argued that the question of the legality of the seizure could not be raised on the trial after it had once been passed upon on a motion to suppress, but this contention was brushed aside, the court saying:

> "The papers being of 'evidential value only,' and having been unlawfully seized, this question really is, whether it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted by that court in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion, and to consider and decide the question as then presented even where a motion to return the papers may have been denied before trial."

See also

Amos vs. U. S., 255 U. S. 313.
Agnello vs. U. S., 46 Supreme Court Rep. 6.
Agnello vs. U. S., 70 Law Ed. p. 4.
Weeks vs. U. S., 232 U. S. 383.
U. S. vs. Wexler, 4 Fed. Redp. 391 (2nd).
Ganci vs. U. S., 287 Fed. Rep. 60.
Salata vs. U. S., 286 Fed. Rep. 125.
Holmes vs. U. S., 275 Fed. Rep. 49.
O'Conner vs. Potter, 276 Fed. 32.
Agnello vs. U. S., 290 Fed. Rep. 671.

In the present case there were special circumstances which authorized the Plaintiff in Error to renew his motion to exclude the evidence unlawfully seized, when the same was offered during the course of the trial. The motion to suppress prior to the trial was denied because of a disclaimer of ownership on the part of the Plaintiff in Error of the premises searched and the property seized; the search warrant was directed to the three Japanese named therein, and the Plaintiff in Error was arrested because he voluntarily appeared upon the scene, while the prohibition agents were conducting their search. When the information was filed the three Japanese named in the search warrant were not included but the Plaintiff in Error was named as the sole defendant. On the trial the government produced witnesses who testified that the Plaintiff in Error had admitted to them ownership and con-

trol of the premises in question, and then offered in evidence the property seized. To this offer the Plaintiff in Error objected, and if it should appear that the evidence offered was seized under an invalid search warrant, this objection should have been sustained.

This brings us then to a consideration of the question of the validity of the search warrant proceedings. The affidavit for the search warrant contains the following as a statement of facts, constituting probable cause for the issuance of the search warrant, to-wit:

> "That the crime, etc., is being committed in this, etc., one K. Hara, H. Y. Oka, Wani Kamol, K. Yakyo, true name unknown to this affiant, proprietors and their employees, 606 Sixth Avenue South, on the 11th day of March, 1924, and thereafter was and is possessing a still and distilling apparatus and materials designated and intended for the use in manufacturing intoxicating liquor and is manufacturing, possessing, transferring and selling intoxicating liquor all for beverage purposes; and that in addition thereto, affiant on said 11th day of March, 1924, and on previous occasions detected the odor of intoxicating liquor on said premises, and that said premises is not used as a residence but is a manufacturing plant."

The search warrant, based upon this affidavit, recites that the persons named

> "at said time and place possess a still, and distilling apparatus and materials designed and intended for the use in manufacturing intoxicating liquor and manufacturing, possessing, transferring and selling intoxicating liquor, all for beverage purposes."

The return of this search warrant shows that no still or distilling appliances were found on the premises, but merely a quantity of intoxicating liquor and some boxes of raisins, sacks of sugar, cans, kegs and barrels (Tr. pp. 23-31-32).

The affidavit was insufficient to authorize the issuance of a valid search warrant, in that it contained no statement or recital of evidenciary facts but is general in its terms and recitals.

This question is no longer an open one in this court.

In *Lochnane vs. U. S.*, 2 Fed. Rep. 427 (2nd), it was held, that an affidavit for a search warrant, reciting that the defendants were the proprietors of a certain hotel and had been and were possessing, transferring and selling intoxicating liquor for beverage purposes on the hotel premises was insufficient to authorize the issuance of a search warrant and that evidence, seized under the search warrant, should have been suppressed. In the opinion in that case it was said:

"We are of opinion that the mere sworn general statement that a proprietor of a hotel at a certain place is unlawfully possessed of intoxicating liquor for beverage purposes, or is transporting or selling the same, is not sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant which directs a search of the hotel named. It is fundamental that under title 1, section 5 of the Espionage Act, 40 Stat. 228 (Comp. St. 1918; Comp. St., Ann. Supp. 1919, p. 10212e), before a judicial officer is authorized to issue a search warrant, he must have before him, by affidavit or deposition the facts tending to establish the grounds of the application, or probable cause for believing that the facts exist. Tested by this requirement, the affidavit under consideration is fatally defective. It lacks any statement of an evidentiary fact tending to show that the defendants illegally possessed intoxicating liquor, or were transporting or selling liquor. Not a circumstance is set forth tending to show that affiant had any knowledge to support his conclusion. When the validity of such an affidavit was before the Circuit Court of Appeals for the First Circuit (*Giles vs. U. S.* 284, F. 208, 214) the court said: 'It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner.' *Tynan vs. U. S.* (C. C. A.), 297 F. 179; *Woods vs. United States* (C. C. A.), 279 F. 706. With that view we agree."

It may be argued that th erecital that the affiant had detected the odor of intoxicating liquor on said premises is a statement of an evidentiary fact. If so, standing alone, and unsupported and unexplained, it is clearly insufficient to warrant the issuance of the search warrant in question.

To render any such statement of evidentiary value, or sufficient for a finding of probable cause, the circumstances surrounding the detection of the odor, the place where the odor was detected, whether on the outside or the inside of the building; whether the windows and the doors were open or closed, and if open, how near to the aperture the affiant was stationed when he detected the odor and the experience of the affiant in such matters should all be shown.

The idential question was considered at some length in the case of *U. S. vs. Goodwin,* 1 Fed. Rep. 36 (2nd), a case heard in the District Court of the United States for the Southern District of California. In that case it was said:

> "In a proper case, then, it appears that, to give full authority for the issuance of a search warrant, the evidence need establish probable cause only. This evidence may consist of proof of circumstances and conditions which, considered all together, may warrant the inference of

probable cause. The affidavit upon which the warrant was issued in this case recited that the affiant, after receiving numerous complaints that liquor was being manufactured and sold on the premises, 'made investigation and detected the strong odor of fermenting mash and saw several machines leave the premises.' The tangible evidence which that affidavit furnished is all contained in the statement just quoted, for it was not made to appear who the persons were from whom the hearsay complaints were received, or anything to show upon what facts such complaints were founded.

As to the quoted statement, the assertion that the investigator detected the strong odor of fermenting mash (from what part of the premises we are not informed) cannot be said to furnish sufficient proof of probable cause that the building which was afterwards searched was being used as a place wherein liquor was being manufactured to be sold or disposed of in violation of the law. The experience of the investigator might have been such as to authorhim to say that, from the appearance of things and considering the odor which he noticed, liquor was there being manufactured in commercial quantities and for purposes of sale. There are many small items of circumstances which can well be imagined open to the observation of a prohibition inspector, which, when fully set forth in an affidavit, would establish ground for the issuance of a warrant to search a building of any class in which liquor is being unlawfully manufactured. The court or the commissioner cannot, from the statement of the one fact that the investigator noticed about the premises an odor of fermenting mash, infer such a case."

In the present case, the recitals of the affidavit are not nearly as strong, comprehensive or satisfying as those in the case just cited, and were not sufficient to justify the Commissioner in issuing the search warrant in question. This being true, the court below should have sustained the objection of the Plaintiff in Error, when the evidence seized under the invalid search warrant was offered in evidence.

We respectfully submit that this case should be reversed with instructions to dismiss the same.

Respectfully submitted,

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